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No. 83-710

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARRY J. BERKEMER, SHERIFF
OF FRANKLIN COUNTY, OHIO,
Petitioner,

v.

RICHARD N. MCCARTY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

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QUESTION PRESENTED

WHETHER LAW ENFORCEMENT OFFICERS MUST GIVE "*MIRANDA* WARNINGS" TO INDIVIDUALS ARRESTED FOR MISDEMEANOR TRAFFIC OFFENSES. (*MIRANDA* V. *ARIZONA*, 384 U.S. 436 (1966).)

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REPLY BRIEF OF PETITIONER

REPLY ARGUMENT

I. THE TRAFFIC STOP

Respondent's proposed test for custody as a trigger for the prophylactic warnings of *Miranda* v. *Arizona,* 384 U.S. 436, (1966), (probable cause to believe a traffic safety offense has taken place coupled with a traffic stop, Brief of Respondent, at 38) is totally unworkable in the context of highway safety law enforcement. Although disclaiming reliance on "focus" as a standard, (c.f. *Escobedo* v. *Illinois,* 378 U.S. 478

(1964)), respondent urges that probable cause plus a traffic safety stop amounts to the *type* of custody envisioned by the *Miranda* Court. Respondent reasons that Trooper Williams was required to advise him of his *Miranda* rights prior to asking respondent if he had been drinking. Respondent's proposed test for custody is not only unworkable but would require rejection of long-standing principles of the law of arrest and would have totally undesirable effects in the context of highway safety law enforcement.

First, without replication of the various passages underscoring the type of custody that was the concern of the *Miranda* Court, a highway safety stop is simply not the type of coercive, oppressive atmosphere that was thought to overbear the will of the incommunicado arrestee. Suffice it to say that the *Miranda* Court was concerned with what was perceived to be "overzealous police practices", and "menacing police interrogation procedures" designed to put a defendant in "such an emotional state as to impair his capacity for rational judgment". 384 U.S. at 444, 457, 456. In marked contrast, the routine daily enforcement of highway safety laws, experienced at some time by virtually everyone who holds a driver's license, presents no such potential for police abuse.

Respondent's proposal that in conjunction with the traffic stop, probable cause should trigger *Miranda* warnings would require a considerable shift in the law of arrest.

> "Police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long."
> *Hoffa* v. *United States,* 385 U.S. 293 at 310 (1966).

Respondent's proposal would engraft the prophylactic rule of *Miranda* to the foregoing analysis. Respondent's propos-

ed test would require re-evaluation of the Court's recent pronouncements on the meaning of the term "in custody" for *Miranda* purposes. See *Oregon* v. *Mathiason*, 429 U.S. 492 at 495 (1977) and *California* v. *Beheler*, ____ U.S. ____, 103 S. Ct. 3517 at 3520 (1983).

Finally, respondent's proposal that "*Miranda* warnings" are required in a traffic safety stop, would serve to criminalize and alienate the millions of otherwise law abiding citizens who travel our nation's highways on a daily basis. Under respondent's proposed test, a traffic safety officer investigating a minor automobile collision which involves some traffic law infraction, would be required to advise each motorist of his or her various rights. It is no extravagance to visualize the feelings of alienation and criminalization which would be experienced by the average citizen involved in an automobile accident if the traffic safety officer began to formally intone the driver's various "rights". Moreover, upon being so-advised, a motorist would hardly feel free to make any statement regarding the circumstances of the auto collision. Such result would frustrate the normally simple task of determining the cause of the collision and either require the employment of accident investigation squads with attendant disruption of traffic flow or abandonment of the investigation. The undoubted result of the latter would be increased civil litigation to determine fault and liability.

In the context of the questioned applicability of the prophylactic rule of *Miranda* to the everyday world of traffic safety law enforcement, the traditional tests of custody are unworkable. Expansion of the judicially crafted rule to the highway safety setting is not justified by any rational view of that decision and would work an unreasonable result in practice. Any marginal advancement of traditional Fifth Amendment values which might be gained by expanding *Miranda* precepts to the highway safety setting are far outweighed by the very clear negative effect which would be wrought.

II. THE IMPLIED CONSENT TEST AND ALCOHOL INFLUENCE REPORT

Petitioner has argued that the *pro forma,* line-item inquiries of respondent, contained in the alcohol influence report completed after the implied consent test, should not be subject to the strictures of the *Miranda* decision. Petitioner has also argued that due to the unique nature of the offense of impaired driving, the rigidity and simplicity of the prophylactic rule fashioned by the *Miranda* Court would have little utility for lower courts in the case of an individual impaired by alcohol or other chemical substances.

Respondent argues that he was arrested, taken to jail and interrogated about the offense. (Brief of Respondent, at 5.) Amici in support of respondent assert that a motorist is "compelled to accompany police for questioning." (Brief of Amici, American Civil Liberties Union and American Civil Liberties Union of Ohio, at 5.) Both respondent and his supporting amici misperceive the nature and purpose of respondent's presence at the testing facility.

Understandably, respondent stresses that the location to which he was transported for the statutory implied-consent test was the Franklin County jail. At the time of respondent's traffic offense, state law mandated that the impaired driver be advised of the consequences of refusal to submit to the test "at a police station". (Ohio Revised Code, Section 4511.191(C), Brief of Petitioner at 30.) Subsequently, the Ohio General Assembly amended that section to include a hospital, first-aid station or clinic to which the motorist has been taken for first-aid. Transport to a specific location is necessitated both by the fact that machines capable of testing for alcohol can not readily or economically be placed in every highway safety officer's vehicle, and by the statutory requirement that the implied consent form must be read to the impaired driver in the presence of one

other police officer or employee who must then sign as a witness. *Ibid.*

The primary failing of respondent's brief before this Court is that it neglects to discuss, or even acknowledge, that the offense of operating a motor vehicle while under the influence of either alcohol or other chemical substances, is different in kind from other crimes. As such, the impaired driving offense simply does not lend itself to a reasoned or practical application of prophylactic *Miranda* warnings. Unlike any other offense, the officer must take a suspected impaired motorist into custody, i.e., the offender must be conveyed to a facility wherein a chemical test can be administered.[1] Moreover, of necessity, the highway safety officer must engage in some form of questioning of the motorist at least to ascertain whether he will accede to a chemical test.

Respondent expresses concern that the *pro forma* line-item alcohol influence report has the potential for mischief and might be expanded by a clever officer into a far reaching inquiry or might lead to the discovery of evidence of another offense. Respondent counsels rejection of a bright-line approach, urging that officers will not know at which point an investigation shifts from a traffic offense to another matter and will not know when to give *Miranda* warnings. (Brief of Respondent, at 35.) Later in his brief, addressing the traffic stop, respondent urges (inconsistently, we believe) that police are fully capable of making the fine line determination of when reasonable suspicion has ripened into probable cause for arrest. (Brief of Respondent, at 46.) Respondent's argument should be rejected.

The minimal inquiry of respondent to complete the alcohol influence report is neutral in terms of any other of-

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[1]Implied consent statutes aside, no rational person has ever suggested that persons in a state such as that evidenced by respondent, should simply be permitted to drive away. The record clearly demonstrates that respondent represented a clear and present danger both to himself and all other motorists on the state's highways.

fense. There is no provision therein regarding unrelated matters. Officers will readily comprehend that should they feel inquiry into other matters is warranted or necessary, or if the subject begins to speak regarding other offenses, either *Miranda* advice would precede further inquiry or, if the level of intoxication through alcohol or drug impairment is great, the officer will know to await sobriety before administering *Miranda* advice and proceeding further.[2]

Moreover, the lower courts are fully capable of dealing with any mischief occasioned by an overzealous officer's attempt to expand upon the limited information sought. Petitioner has pointed out that unlike detectives engaged in criminal investigations, the typical traffic safety officer must return to patrol duty as rapidly as possible. (Brief of Petitioner, at 20, 21 and see recommendations of the Presidential Commission on Drunk Driving cited by Amicus, the State of Ohio, at 21.)

Courts will be equally adept at discerning the line of demarcation between the *pro forma,* limited inquiry of the impaired driver, which would be admissible in the traffic safety case and any inquiry sought to be introduced in a prosecution for a separate offense. Thus, contrary to respondent's fears, a bright-line decision admitting the alcohol influence report in the prosecution of the impaired driver without pre-existing "*Miranda* advice", while excluding its use for any other prosecution, will be readily understood and applied by law enforcement and courts alike.

Moreover, the unique nature of the case of the impaired driver is in stark contrast to the typical investigation of other offenses. Any responsible police detective seeking to question a custodial suspect regarding any other crime will first

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[2]As argued by petitioner, due to the unique nature of the impaired driver, even with *Miranda* advice, the question of voluntariness, whether for the traffic offense of drunken driving or in the context of a separate prosecution, will have to be addressed by trial courts in any event. (Brief of Petitioner, at 23-24.)

inquire as to the suspect's age, educational background, and ability to read to determine whether the suspect has the capacity to appreciate his "*Miranda* rights". Almost universally, this preliminary inquiry will include the question of whether the suspect has ingested alcohol or other chemical substances. In contrast, extension of *Miranda* to the impaired driver would preclude this very inquiry into the suspect's ability to comprehend *Miranda* warnings as the preliminary inquiry is directed to the offense itself. To apply *Miranda* strictures under these circumstances would require adoption of a paternalistic rule that no statement of an impaired driver may be admitted, despite clear indicia of voluntariness in the traditional sense. Absent incompetence, this Court has never taken that position. (See *Michigan* v. *Mosley*, 423 U.S. 96, at 108-109 (1975) (White, J., concurring.)) This anomalous result alone, is sufficient reason to decline respondent's invitation to expand the *Miranda* doctrine.[3]

Moreover, in respondent's case, the very fact of respondent's behavior in light of the completely negative result of

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[3]In point of fact *every* question posited to an impaired driver is potentially incriminating no matter how facially innocuous. If an impaired motorist cannot accurately answer such wholly neutral questions as what is your date of birth, are you married, what is your address, where are you employed, when did you last eat or sleep, or where were you stopped, such inability is in itself material and will be utilized by the prosecution in any ensuing trial for driving under the influence. Indeed, examination of the alcohol influence report, herein, demonstrates that respondent neither knew the date or the day of the week on which he was arrested, i.e. respondent stated that it was Sunday, March 28, 1980, when it was in reality Monday, March 31, 1980. (JA 2,3). Taking respondent's argument to its logical conclusion would require that the court abrogate the recognized exception from *Miranda* strictures for those words normally attendant to arrest and custody. See *Rhode Island* v. *Innis*, 446 U.S. 291 at 301 (1980).

the blood-alcohol test, mitigates in favor of *pro forma* inquiry of the type normally associated with arrest or booking procedures. Clearly, respondent was unable to function behind the wheel of an automobile. His slurred speech, drowsiness, and inability to stand without aid would require any conscientious person charged with the responsibility of his well being to inquire further.

It is beyond question that an arrestee is entitled to a reasonable degree of care from his custodian. It would have been the height of irresponsibility had respondent been ushered to the door following the blood-alcohol test which indicated no blood-alcohol content and left to his own devices. Equally irresponsible would be the custodian who failed to make normal inquiries into the cause of such person's otherwise inexplicable behavior. Typically, any arrestee booked for a criminal offense will be asked not only his name, address, social security number and other identifying information, but also whether he is under a doctor's care, requires or has taken, medication or other drugs. Words normally attendant to arrest and custody are not the type of questioning envisioned by the *Miranda* Court. See *Rhode Island* v. *Innis,* 446 U.S. 291 at 301 (1980). Should the arrestee exhibit unusual behavior (as did respondent) and the custodian fail to make reasonable inquiry, resultant injury, illness or death would undoubtedly be followed by a civil damage action or proceedings under Title 42 United States Code Section 1983.

The synergistic effect of combining various chemical substances is well documented. For example, the widely abused drug methaqualone, commonly known as quaalude or sopor, typically produces drowsiness in clinical dosage. When taken in an overdose, the drug may result in delirium and coma progressing to convulsions, pulmonary edema and cardiac or respiratory arrest.

"The patient should be warned about the possible addi-

tive effects when methaqualone is taken concommitantly with other central nervous system depressants such as alcohol or barbiturates."
Physician's Desk Reference to Pharmaceutical Specialties and Biologicals, Medical Economics Company, Oradell, New Jersey (1982), at 1074-1075.

Commonly prescribed minor tranquilizers such as Librium and Valium are equally dangerous when taken in conjunction with alcohol or other central nervous system depressants. (*Ibid.*, at 1599, 1625.) While adverse reaction to these chemicals normally includes drowsiness and similar states, the paradoxical reactions of hyperexcitement, hallucinations, and acute rage are also noted. (*Ibid.*, at 1599, 1625.) Faced with otherwise inexplicable behavior typified by adverse reaction to chemical substances described above and without knowledge of the substance or substances ingested, a physician employed by the custodial facility may well utilize a fatally incorrect remedial measure thus subjecting the governmental entity to civil liability. No one has suggested that these *pro forma* inquiries attendant to the booking process should be preceded by prophylactic *Miranda* warnings. Clearly, these inquiries are not the type of investigative interrogation contemplated by the *Miranda* Court. Equally reasonable is the *pro forma,* line-item inquiry of the alcohol influence report form. (JA 2) The regulated, limited questions and respondent's answers filled in by Trooper Williams are not the form of interrogration contemplated by the *Miranda* Court. The form could well have been filled out by a clerical employee, leaving the traffic officer free to return to his highway safety patrol. In point of fact, expediting the booking process was among those recommendations of the Presidential Commission on Drunk Driving. (See Brief of Amicus, the State of Ohio at 21.)

III. APPLICATION OF THE RULE OF HARMLESS ERROR

Petitioner has urged that if, contrary to petitioner's submission, the Court should find the brief, *pro forma* inquiries of the alcohol influence report form following the implied consent test, create the same type of coercive custodial interrogation atmosphere found offensive in *Miranda* and thus, extend that holding to highway safety arrests, admission of McCarty's statements included in the report falls within the harmless error rule. *Chapman* v. *California,* 386 U.S. 18 (1967). Respondent urges that the question of harmless error is not fairly subsumed in the question presented and was not urged by petitioner in the courts below.

Although this Court is not required to review the record to evaluate a harmless error claim, the Court has the authority to do so. See *United States* v. *Hasting,* ____ U.S. ____, 103 S. Ct. 1974 (1983).[4] The dissent below expressly addressed the issue of harmless error under *Chapman, supra.* Implicit, therefore, in the majority decision is a rejection of harmless error. Thus, the issue was ruled upon. Petitioner believes the question of harmless error is fairly subsumed in the question presented despite the fact that it was not specifically addressed in the petition. (See Rule 21.1(a) and Rule 34.1(a).)

Respondent urges that his statement, "I guess, barely", in response to the inquiry of whether he felt he was under the influence of an alcoholic beverage, should not fall within the harmless error rule. (Joint Exhibit, Alcohol Influence Report, JA 2.) Respondent argues that he exhibited signs of unsteadiness and slurred speech and that the statement "I guess, barely," was significant to his conviction. (Brief of Respondent, at 48.) Actually, respondent exhibited much more than signs of unsteadiness. Respondent was "falling" and "had to be held up from falling down." (Alcohol Influ-

[4]The Court has before it, the identical record reviewed by the Court of Appeals below. *Ibid.*, 103 S. Ct. at 1981, n. 8.

ence Report, JA 2.) Respondent's speech was "very slurred" and "very hard to understand". (*Ibid.*, JA 2 and Stipulation, Appendix to Petition, A 2.) At the scene of the traffic stop, respondent stated he had consumed "two beers and had smoked several joints of marijuana a short time before". (Stipulation, Appendix to Petition, A 2.)

The dissent below correctly categorized the statement in the alcohol influence report as "essentially repetitious confession evidence." (Opinion below, JA 14.) Therefore, assuming *arguendo,* error, admission of the "essentially repetitious" statement was harmless error. c.f. *Milton* v. *Wainright,* 407 U.S. 371 (1972).

CONCLUSION

Custodial questioning inherent in highway safety law enforcement is demonstrably different from the incommunicado investigative interrogations found coercive by the *Miranda* Court and is not within the contemplation of that decision. Respondent's proposed test for custody in highway safety stops would require that *Miranda* warnings be given at the moment that any highway safety officer stopped a motorist for a traffic infraction, an extravagant extension of *Miranda* which would be both unworkable and would trivialize the precepts of that decision.

The traffic safety offense of impaired driving, whether by alcohol or other chemicals, is different in kind from any other offense. *Pro forma,* line-item inquiries restricted to the subject of the impaired driver are not the form of interrogation envisioned by the *Miranda* Court. The balance struck by the *Miranda* Court is inapplicable in the context of highway safety enforcement in general, and to impaired motorists specifically.

Wherefore, the judgment of the court below should be reversed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of the Rules of the Supreme Court, I hereby certify that the requisite number of copies (3) of the foregoing Reply Brief of Petitioner have been served upon respondent, Richard N. McCarty, by personal service of such copies to the office of respondent's counsel of record, R. William Meeks, 503 South High Street, Columbus, Ohio 43215, by delivery to counsel for respondent, or to an employee thereof, this 6th day of April, 1984.

I further certify that all parties required to be served have been served. The respondent's name is Richard N. McCarty, and his address is 529 Erickson, Columbus, Ohio 43213.

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Counsel of Record
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